CAMPAIGN FINANCE/Issue Advocacy-Express Advocacy

SUBJECT: **Paycheck Protection Act . . . S. 1663. McConnell motion to table the Snowe/Jeffords amendment No. 1647 to the McCain/Feingold substitute amendment No. 1646.**

ACTION: MOTION TO TABLE FAILED, 47-50

SYNOPSIS: As introduced, S. 1663, the Paycheck Protection Act of 1998, will prohibit corporations and unions from assessing workers dues or fees that will be used for political activities unless those workers give prior written, voluntary permission for such assessments.

The McCain/Feingold substitute amendment would make all political party contributions subject to strict "hard-money" limits, and would broaden the definition of "express advocacy" (which would make much more of the political speech of independent groups subject to strict contribution limits and reporting requirements). The text of the amendment is identical to the text of the McCain/Feingold campaign finance bill considered last session. For details, see vote No. 12.

The Snowe/Jeffords perfecting amendment to the McCain/Feingold amendment would strike section 201 (on express advocacy) and add alternate provisions. In lieu of the McCain/Feingold language, the Snowe/Jeffords amendment would define a new category of regulated speech called "electioneering communications." A four-part test would be used to determine if a communication fell into this new category: it would have to refer to a clearly identified candidate for Federal office; it would have to be made within 30 days of a primary or 60 days of a general, special, or runoff election; it would have to be broadcast from a television or radio broadcast station; and it would have to be broadcast from a station whose audience included the electorate involved. Newscasts and editorials would be exempt (unless they were made from broadcast stations that were owned or controlled by political parties, committees, or candidates). Communications that were regulated as campaign expenditures or independent expenditures would not also be regulated as electioneering communications. The amendment would define an independent expenditure as an expenditure: that expressly advocated the election or defeat of a clearly identified candidate; and that was not provided in coordination with a candidate. Electioneering communications made in coordination with a candidate would be regulated

(See other side)

YEAS (47)

Republicans (47 or 85%)		Democrats (0 or 0%)
Abraham	Hatch	
Allard	Helms	
Ashcroft	Hutchinson	
Bennett	Hutchison	
Bond	Inhofe	
Brownback	Kempthorne	
Burns	Kyl	
Campbell	Lott	
Coats	Lugar	
Cochran	Mack	
Coverdell	McConnell	
Craig	Murkowski	
D'Amato	Nickles	
DeWine	Roberts	
Domenici	Santorum	
Enzi	Sessions	
Faircloth	Shelby	
Frist	Smith, Bob	
Gorton	Smith, Gordon	
Gramm	Stevens	
Grams	Thomas	
Grassley	Thurmond	
Gregg	Warner	
Hagel		

NAYS (50)

Republicans (8 or 15%)	Democrats (42 or 100%)	
Chafee	Akaka	Johnson
Collins	Baucus	Kerrey
Jeffords	Biden	Kerry
McCain	Bingaman	Kohl
Roth	Boxer	Landrieu
Snowe	Breaux	Lautenberg
Specter	Bryan	Leahy
Thompson	Bumpers	Levin
	Byrd	Lieberman
	Cleland	Mikulski
	Conrad	Moseley-Braun
	Daschle	Moynihan
	Dodd	Murray
	Dorgan	Reed
	Durbin	Reid
	Feingold	Robb
	Ford	Rockefeller
	Glenn	Sarbanes
	Graham	Torricelli
	Hollings	Wellstone
	Inouye	Wyden

NOT VOTING (3)

Republicans (0)	Democrats (3)
	Feinstein-[2]
	Harkin-[2]
	Kennedy-[2AN]

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

as contributions rather than as electioneering communications. Labor unions and corporations would be barred from using their general funds to pay for electioneering communications. They could use funds from their political action committees (PACs), the contributions to which are voluntary. 501(c)(4) corporations (nonprofit corporations that are not tax-exempt) could make electioneering communications only if they did not receive any funds from entities prohibited from making such communications. If a 501(c)(4) corporation received any such funds, it would have to create a segregated account similar to a PAC if it wished to make an electioneering communication. As soon as any entity spent $10,000 in an election cycle on electioneering communications, and for each $10,000 it spent thereafter, it would be required to report to the Federal Election Commission the names and addresses of donors for those communications if they gave $500 or more over a 2-year period. Donor limits would not be placed on electioneering communications.

Debate was limited by unanimous consent. After debate, Senator McConnell moved to table the Snowe/Jeffords amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

NOTE: After the vote, the amendment was adopted by voice vote.

Those favoring the motion to table contended:

Our colleagues have listened to our criticisms of the underlying substitute amendment and have crafted this amendment in a good-faith effort to answer some of those criticisms. Specifically, they have rewritten the section that would place free-speech restrictions on issue advocacy and they have given workers some protection from having their money involuntarily collected and used for politics by unions and corporations. Our colleagues' amendment would eliminate some of the constitutional problems, but it would retain others and would create new due process and equal protection violations. Even if it did not create new problems, though, we would be unable to support it. While we appreciate the need for compromise in the legislative process, we also note that the Constitution cannot be compromised. Senators must never support a proposal on the basis that is has fewer unconstitutional features than an alternative. Additionally, it still is predicated on the same, false premise that Congress needs to suppress the amount of political speech that is not controlled by candidates themselves. We believe that premise is undemocratic and extremely dangerous to our republic.

The approach taken by our colleagues on issue advocacy has been to redefine issue ads that meet certain criteria as a new type of communication, which they call an "electioneering communication" and which they propose to regulate. In an effort to make their proposal pass constitutional muster, our colleagues have created a 4-part, "bright line" test to distinguish between unregulated issue advocacy and ads that they want to regulate as "electioneering." That test calls for the regulation of television and radio commercials that mention a candidate's name (unless the commercials are paid for by the broadcasters as "news" or as "editorials" and provided that the broadcasters are not some type of "political" group), that are broadcast within 60 days of an election or 30 days of a primary, and that are broadcast in areas where they may be heard by the electorates involved. We are not certain if our colleagues believe that they are proposing a new definition for express advocacy or a new category of issue advocacy that can be regulated. Either way, though, their proposal is unconstitutional.

Though the definition in this amendment is much clearer than the definition in the underlying McCain/Feingold substitute amendment, more is required of a test than that it be clear. A clear test that clearly violates constitutional rights cannot be supported. Though our colleagues have a very difficult time accepting the fact, the Supreme Court in Buckley v. Valeo and in numerous subsequent cases has without variation affirmed that express words of advocacy, such as "vote for" or "vote against," must be included in an independent communication before it can be regulated. Our colleagues' test does not make that definite distinction and it is therefore by definition unconstitutional as a means of regulating express advocacy. If a group simply mentioned a Member's name in an ad, without giving the slightest hint of whether it supported that Member's reelection, it could result in that group having its speech regulated. Far from meeting the Supreme Court's "express" words test, not even an "implied" or "slight indication" test would be used. The ads it would regulate clearly do not fall within the Supreme Court's definition of express advocacy.

The question, then, becomes whether it is constitutional to place restrictions on the type and content of some issue ads, as well as restrictions based upon whom is paying for such ads, because that is what is being proposed by the Snowe/Jeffords amendment. Our colleagues' amendment would regulate broadcasts only. Some Senators have given the honest explanation that they want to limit broadcasts because they are the most effective form of communication. We note, however, that the Constitution does not give Americans the free speech right to attempt to influence public policy decisions in only the most ineffective means possible. We note also that new due process and equal protection problems would be raised by saying that any newspaper, handbill, cable, rally, or other communications would be unrestricted; only broadcasts would not be. Our colleagues justify this inequitable treatment by saying that broadcast licenses are a limited public good that can be regulated. In response, we believe that it is highly questionable to say that it is in the "public interest" to regulate issue advocacy ads. Americans have, need, and deserve to have the right to privacy in their associations, and they certainly do not lose that right if they attempt to have an influence on the public sphere. Our colleagues then create even greater problems by distinguishing between favored and disfavored speech of broadcasters. They obviously think that speech paid for by broadcasters themselves is good speech, because their amendment would carve out an exemption from

regulation of such speech. However, they then add another distinction based upon who is daring to speak--they say that "political" broadcasters would not be exempt. Our colleagues are basically saying that only some broadcast stations could run any slanted news stories and editorials they wanted and remain exempt from regulation. Those owners would have free-speech rights that no other Americans enjoyed. "Political" owners and non-owners who purchased time would have their speech regulated. We suppose public policy groups could buy broadcast outlets, but would the FEC speech police then try to define them as "political" owners when they ran ads?

The controlling case on the privacy rights of associations engaged in the public sphere is NAACP v. Alabama, in which the Supreme Court ruled that the NAACP could not be forced to disclose the names of its members as the price for pursuing its policy goals. The Court wrote in that case that "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth amendment, which embraces freedom of speech . . . It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters . . . In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of government action." Some Senators have said that the Court just made an exception in that case because disclosure would have resulted in economic and even physical reprisals against NAACP members. However, nothing in that case indicated that the Court was making a narrow exception. The Court did not in any way indicate that the FEC speech police would be in charge of deciding whether or not any group had a legitimate reason for wanting to keep the names of its donors secret.

We concede, and are thankful, that our colleagues have tried to find common ground with this amendment. Unfortunately, they are still on the wrong side of the Constitution. Issue advocacy should not and may not be regulated. Our colleagues have lamented the rapid growth of such advocacy; we have told them, in debate after debate over the years, that they have ensured that result with their ill-advised campaign finance laws that are on the books. They have shoved spending into issue advocacy by restricting campaign spending and express advocacy (the Supreme Court even predicted this result when it first issued its Buckley decision). Trying to shut people up in elections is like putting a rock on jello--clamp down on one area, and it is going to ooze out in others. Adding to the effect has been the growth of the Federal Government. The Federal monolith has grown uncontrollably, and as its control over people's lives has escalated so has their interest in trying to influence its actions. Outside of a complete regimen of censorship, including of the press (which the Snowe/Jeffords amendment would begin with its distinction between political and nonpolitical broadcasters), campaign spending cannot be restricted. We add that campaign spending should not be restricted. In prior debates, and in this debate, we have argued that the best antiseptic is sunshine, but we have not argued that the best antiseptic is sunshine on areas like issue advocacy that are protected by privacy considerations. Remove or substantially raise contribution limits and require immediate disclosure and funds will once again flow through campaigns. The growth of issue advocacy spending, which is rightly private, will be reversed. Americans will be able to judge for themselves, with their votes, whether influence is being bought with contributions.

Our colleagues object to issue advocacy commercials that appear at the end of their campaigns. They are vilified (or their opponents are praised), and they do not like it. Imagine--an election may be influenced by such commercials. Why, the utter effrontery of people daring to talk about issues that may affect how people may vote! We, on the other hand, see such commercials as evidence of a vibrant democracy, even though we have been their frequent targets.

We may not really be that far apart from our colleagues on this aspect of the campaign finance debate. Issue ads cannot and should not be regulated; if campaign ads were not restricted and were fully disclosed, the result that the Snowe/Jeffords amendment is trying for would be achieved. Funding that is currently being forced into issue ads by campaign finance laws would remain in campaigns and would be disclosed in accordance with constitutional rulings. The amount being spent on campaigns has grown because the size and intrusiveness of the Government has grown, increasing people's stake in influencing its policies. Americans have a right to be able to judge whether influence is being "bought"; they should know, before they vote, who is contributing how much to whom. We do not want to limit the amount being spent on campaigns; it would be fundamentally wrong for us to try to limit the amount of speech in campaigns, and without spending there cannot be effective speech. Disclosure of express advocacy spending and direct spending by candidates and their parties is constitutional and helpful; if our colleagues quit trying to limit spending and regulate speech that is constitutionally and rightly protected, a compromise may yet be found. Our colleagues, though, are still on the wrong side of the Constitution, so we must urge the defeat of their amendment.

Those opposing the motion to table contended:

Our colleagues have given us a shifting target. In prior debates, most of their complaints were over our proposals to have public financing of Federal elections. We removed those proposals, and they then found new reasons to complain. On the McCain/Feingold amendment, they have spent a great deal of effort explaining why they do not think that its restrictions on so-called "issue advocacy" advertisements pass constitutional muster. Those restrictions would broaden the definition of express advocacy. Our colleagues have said that they disagree with the clarity and breadth of the proposed definition. Therefore, we have consulted with constitutional

experts and have come up with a new approach that those experts, and we, believe meets our colleagues' constitutional objections.

First, we have developed a very clear, 4-part, completely objective test for deciding which ads to restrict. An ad would have to occur within a specified timeframe; it would have to mention a candidate by name; it would have to be broadcast; and it would have to be broadcast where it would be heard by the electorate involved. No leeway exists for any part of this test; each element would be met or it would not.

Second, once it was determined that an ad needed regulation, that regulation would be limited to disclosure of donors of large amounts. Large donations, as the Supreme Court has ruled, carry with them the appearance or actuality of corruption. People naturally suspect, and sometimes are right, that elected officials give special legislative favors to campaign contributors who give large donations. The purpose of disclosure, which our colleagues always purport to favor, is not to restrict information--it is to give more information. Disclosure is the least restrictive means of regulation.

Third, and relatedly, the amendment would only apply to ad campaigns that exceeded $10,000 in cost. A high threshold was set to make certain that burdens were not put on small groups. Also, ad campaigns that are below that amount are too small to say that they are having a corrupt influence on an election.

Fourth, the amendment would only apply to broadcasts. Almost all of the money spent on express advocacy ads that are disguised as issue advocacy ads are spent on radio and television broadcasts. Many of us believe that it is appropriate for this amendment to narrow in on broadcasts because that is where the problem is. Others of us are pleased that only broadcasts would be targeted because that approach is unquestionably constitutional. Broadcast spectrum is a limited public good that is licensed, and which Congress can, should, and does license with conditions to ensure it is used appropriately.

Though this amendment would draw a very clear, bright-line test to target broadcast commercials that are obviously really campaign commercials, and though the only requirement it would impose would be disclosure, our colleagues still insist that the Supreme Court would strike it down. First, they have said that it would violate the Supreme Court's requirement for express words of advocacy. However, as the 9th Circuit decision in the Furgatch case established, other tests are possible so long as they are clear and focused. Second, they have said that the Supreme Court's decision in NAACP v. Alabama established a right for groups to keep their membership lists anonymous. However, that case was exceptional in that disclosure of members' names would have been very dangerous for those members. Because the Snowe/Jeffords amendment would only apply to rich donors, not members, it is unlikely that a situation such as occurred in NAACP v. Alabama would ever arise, but if it did, a court could make an exception. The right to anonymity is not nearly so broad as our colleagues would have us believe. For instance, in McIntyre v. Ohio Elections, Justice Scalia was very critical about the supposed scope of that right, and he noted that disclosure can be helpful in curbing "mudslinging" and "character assassination" and improving our elections. Third, our colleagues have alleged that the amendment would violate due process and equal protection rights because it would only apply to broadcasts. However, as we have already pointed out, Congress has a right to regulate broadcasts in a manner that it may not regulate other methods of communication.

The Snowe/Jeffords amendment would also ban union and corporation advertising right before elections except through their PACs, which contain only voluntary contributions. Due to the unique legal privileges of unions and corporations, the constitutional right of imposing such restrictions has long been recognized. Our colleagues who have complained so strongly about unions spending large sums of money on elections without the permission of their members should recognize that this amendment would stop most of that spending. We think that it is a fair, and constitutional, compromise.

With the constitutional objections removed, the question becomes only whether it is a good idea to clamp down on so-called issue advertising by making the people who pay for those ads admit who they are. Our colleagues say no, but that is because they are insisting on the fiction that these ads are not really campaign ads. The Annenberg Public Policy Center analyzed the 1996 Federal elections, and, using conservative estimates, found that between $135 and $150 million, or roughly one-third, of all the spending on those elections was on so-called "issue" advertisements. It further found that 87 percent of those ads mentioned a candidate by name, and 41 percent of those ads were purely negative. The growth in issue advocacy expenditures has been exponential. The fact that such a large percentage of them are purely negative is a natural outgrowth of the fact that the sponsors of the ads are allowed to remain anonymous. Ads by candidates themselves are not so negative because they result in voter backlash; no backlash can occur against an anonymous advertiser.

If it were not for the fiction that this amendment addresses issue advertising, we believe that our colleagues would agree with us that disclosure is a good idea. We urge our colleagues to stop pretending that the campaign ads that are targeted by this amendment are really issue ads. We urge them to oppose the motion to table.